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No. 510

In the Supreme Court of the United States

OCTOBER TERM, 1960

HERMAN KRAVITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–16a) is reported at 281 F. 2d 581.

JURISDICTION

The judgment of the Court of Appeals was entered on August 12, 1960 (Pet. 16a–17a), and a petition for rehearing was denied on September 30, 1960 (Pet. 19a). The petition for a writ of certiorari was filed on October 27, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the prosecutor committed reversible error in his summation by comparing petitioner's crimes with treason, where there was no objection at the trial.

2. Whether the District Court transgressed the jury's function of passing upon the credibility of witnesses by commenting upon the credibility of one witness and by reading to the jury a portion of the direct testimony of another witness, where the jury was repeatedly instructed that it was the sole judge of credibility.

3. Whether the District Court erred in denying a continuance requested late in the trial to permit the defense to examine testimony, allegedly given before a grand jury in another district, in order to show that the Government was conducting another prosecution inconsistent with the theory of one count in the instant case.

4. Whether the sentence imposed by the District Court is so harsh as to call for vacation by an appellate court.

STATUTES INVOLVED

18 U.S.C.:

> SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined

not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

STATEMENT

In March 1958, petitioner and his father, Samuel Kravitz, were indicted, each in three counts, for the willfully attempted evasion of a large part (more than $500,000) of their 1951 individual income taxes and a large part (more than $780,000) of the 1951 taxes of Kravin Park Clothes, Inc. ("the corpora-

tion"), and for conspiring to evade the corporation's taxes. One Joseph Abrams was also named as a defendant in the two counts relating to the corporation. (R. 1a, 3a, 5a, 9a, 15a–21a.) Petitioner, having pled not guilty to all charges at his arraignment on June 20, 1958, withdrew those pleas on July 8, 1958, and entered pleas of guilty. (R. 3a, 5a, 10a, 27a.) On October 2, 1959, the District Court ordered petitioner's bail increased from $1,000 to $20,000. One week later petitioner moved for leave to withdraw his pleas of guilty. The motion was granted on October 16, 1959, pursuant to the trial judge's policy of refusing to sentence defendants protesting their innocence before imposition of sentence. (R. 3a, 5a–6a, 10a–11a, 33a.)

Petitioner and Samuel Kravitz were tried before a jury early in 1960 and found guilty on all counts. Abrams, severed from other defendants, testified as a Government witness. (R. 1a–2a, 3a–4a, 6a–7a, 12a–13a, 22a.) Samuel Kravitz was sentenced to concurrent two-year prison terms on each of the three counts and fined $30,000. (R. 749a.) Petitioner was fined $30,000 and was given a total prison sentence of ten years: a five years sentence was imposed on each of the three counts, the corporate evasion sentence to be served following the sentence on the individual evasion count, and the conspiracy sentence to be served concurrently with the sentence on the corporate evasion count. (R. 751a.)

The Court of Appeals affirmed petitioner's conviction, but reversed the conviction of Samuel Kravitz on the ground that there was not sufficient evidence

to connect him with the tax evasion scheme. (Pet. 15a–16a.)

The evidence of petitioner's guilt may be summarized as follows:

In 1951, Samuel Kravitz owned 55% of the stock of Kravin Park Clothes, Inc., and petitioner, his son, owned the other 45%. (R. 525a.) The corporation was engaged in the manufacture of clothing under Federal Government contracts. (R. 228a.) It maintained two separate checking accounts in Atlantic City, New Jersey, and one in New York City. (R. 68a, 79a, 86a.) A large number of checks drawn against these accounts were charged as sub-contractor costs on the corporate income tax return. The corporate books showing sub-contractor costs were not available to the Treasury investigating agents, petitioner having informed them that "they could not find such records." (R. 48a.)[1] The corporation's accountant, however, had prepared a worksheet (in connection with certain forms required by the Renegotiation Board) which listed the amounts—rounded off to the nearest $100—allegedly paid to sub-contractors during 1951. (R. 61a–62a; Govt. Ex. 7a.) The total appearing on the accountant's worksheet, $3,584,400 (which is almost identical to the amount of $3,584,379 charged to sub-contractors' expense on the corporation's tax return—

[1] The only books available for the agents' examination in 1955 were the corporation's general ledger, the stock certificate ledger and the stock transfer book. (R. 48a.)

Govt. Ex. 1) included the following ostensible payments (Govt. Ex. 7a):

Prisil Manufacturing Co.	$142,600
Model Clothes, Inc.	110,400
Good Grade Clothes	190,400
Joe Kipness Coats & Suits, Inc.	226,200
J. K. Productions, Inc.	44,700
Nat Rosen	234,200
Al Legnetti	10,500
Total	$959,000

The agents' investigation disclosed that practically all of the deductions taken on account of these alleged payments were false and fraudulent. Some of the names of the alleged suppliers were fictitious; one was a dormant company; some were companies actually in business, but doing no business whatsoever with the corporation during 1951; and one (Prisil Manufacturing Co.) was a sub-contractor of the corporation to the extent of $13,531, as compared with the $142,600 claimed. Without the knowledge of the ostensible subcontractors, petitioner and Abrams opened bank accounts in the names of the firms, in which they deposited the corporation's checks in payment of false invoices. (R. 95a, 100a, 111a–112a, 117a–118a, 120a–122a, 131a–133a, 134a–135a, 138a, 142a, 175a, 221a, 232a, 239a–241a, 244a, 251a, 542a; Govt. Exs. 7a, 45, 46, 50, 51, 54 and 55.) Petitioner and Abrams then withdrew the funds at will from these various bank accounts, mainly by means of certified checks payable to Gregory Harrington Co., Inc., New York bond brokers. (Govt. Ex. 172, p. 4.) The funds were then used to purchase—in fictitious names—bearer bonds issued by various municipal and state authorities. (Govt. Exs. 102 to 152, inclusive.) Abrams testified

that more than $1,000,000 worth of such bonds went to petitioner. (R. 275a.)

Petitioner admitted his part in the scheme before a Federal grand jury in 1958 (after conferring with his attorney—R. 215a), where he testified[2] that Abrams had obtained all of the corporation's Government contracts through his alleged influence with the Quartermaster Corps in New York; that in consideration of this he (petitioner) let Abrams in on the tax fraud scheme; that, as Controller, petitioner approved for payment the fake invoices presented by Abrams and signed the corporate checks; and that he mailed or delivered the checks to Abrams either at one of several New York hotels or at Abrams' office at the Quartermaster Corps. (R. 218a–220a.) Petitioner testified further before the grand jury as follows (R. 221a–222a):

> Question: Did any of these firms of the six I just mentioned actually do sub-contracting work for Kravin Park Clothes?
>
> Answer: No, sir.
>
> Question: Then the invoices were actually for nothing, is that right?
>
> Answer: That's correct.
>
> Question: But you caused them to be entered on the books of Kravin Park Clothes as actual expenses and had checks drawn to pay them?
>
> Answer: That's correct.

[2] This grand jury testimony was received in evidence (R. 205a) and was read to the jury by the prosecutor (R. 213a–222a).

Question: Then you say you delivered these checks personally to Abrams?

Answer: Either delivered them or mailed them. Most of them were delivered.

Question: And some you did mail?

Answer: Right.

Question: Do you know what Abrams did with those checks or was supposed to do with them, according to your arrangement?

Answer: He deposited them in bank accounts that he had opened to these companies and then he said that he was going to invest the proceeds in securities, and whenever I wanted the money he would give it to me, my half of it.

Question: About how much was the total amount of the invoices drawn from Kravin Park that you caused to be paid to Abrams?

Answer: Over $600,000.

Question: And all of the checks for this amount were delivered directly or indirectly by you to Abrams?

Answer: That's correct.

At the trial the defense called only one witness, an employee of a stock brokerage firm, who testified that a partnership owned by petitioner and Samuel Kravitz purchased $50,000 of West Virginia Turnpike bonds in April, 1952. (R. 608a–610a.)

ARGUMENT

1. Petitioner urges (Pet. 20–22) that his conviction should be reversed because the prosecutor, at the close of his summation, stated that the "crime that we are dealing with here is, in a real sense, treason."

(R. 29b.) No objection was made at the trial, and petitioner is in no position to complain now. *Johnson* v. *United States*, 318 U.S. 189, 200–201. As the court below pointed out (Pet. 9a–10a), the summation was a moderate and fair discussion of the evidence in the record up to this point, and to say that this remark "would have a prejudicial effect on a jury which had listened throughout a long trial to the unfolding of the testimony is to attribute a stupidity and absence of common sense which is incredible in a federal jury." (Pet. 9a.)

2. There is no substance to the contention (Pet. 23–26) that the trial judge transgressed the jury's province of passing upon the credibility of witnesses by commenting upon Abrams' credibility and by reading an extract from the testimony of Mrs. Barko. In the first place, the documentary and other circumstantial evidence of the systematic siphoning off of more than $900,000 of unreported corporate profits—without petitioner's confession and Abrams' testimony—fully established petitioner's guilt. Most of Abrams' testimony, except that dealing with the division of the proceeds of the fraud among the conspirators, was corroborated by the testimony of other witnesses or by documentary proof. Moreover, a federal trial judge has the right to comment on the evidence if, at the same time, he makes it clear that the jury remains the sole judge of the credibility of witnesses and of the weight of the evidence—which the trial judge here did no less than five times during his instructions. (R. 682a, 705a, 706a, 710a, 712a.)

Nor, despite petitioner's complaint (Pet. 14–15), did the trial court commit any impropriety in reading to the jury a portion of the direct testimony of Mrs. Barko, without any of the cross-examination. *Allis v. United States*, 155 U.S. 117, 124. As the Court of Appeals noted (Pet. 8a), the "whole episode was but a drop in the bucket which by the time the drop was put in was nearly overflowing."

3. Equally without merit is the argument (Pet. 26–27) that the trial court should have granted a continuance—late in the trial—to enable the defense to obtain certain testimony which it claimed (R. 462a, 742a) might possibly have been adduced before a federal grand jury in New York, indicating that Abrams had kept all of the proceeds of the tax fraud. Apart from the fact that, if true, such evidence would affect only the charge against petitioner for the attempted evasion of his own income tax, the trial court did not abuse its discretion in refusing to continue the trial. Petitioner made no showing as to who the desired witnesses were, what connection they had with the instant case, how they could possibly know who kept what amounts in the highly secret dealings between petitioner and Abrams, how their grand jury testimony could be admitted over the objection of hearsay, and why the defense had waited until the trial was almost over to make the request. When the New York grand jury minutes were finally received by the district judge, many days after the trial was concluded

(R. 742a), he was obviously justified in not reading them, since he regarded them as irrelevant to the case at hand. (R. 450a–465a.)

4. The ten-year prison sentence imposed in this case is not "unprecedentedly harsh", as alleged. (Pet. 27–29.) See, for example, *Lawn* v. *United States*, 355 U.S. 339, in which two defendants each received sentences of fifteen years on tax evasion charges of comparable flagrancy. Nor is the instant case in conflict on this issue with *United States* v. *Wiley*, 278 F. 2d 500 (C.A. 7). The two cases are factually distinguishable. In *Wiley*, the "defense certainly was not frivolous" (278 F. 2d at 504) and the trial court made it plain that the severity of the sentence resulted solely from the defendant's decision to stand trial rather than to plead guilty. Here, however, petitioner had confessed to the grand jury his guilt on two of the three counts, after consultation with his attorney and after he had been warned that his testimony could be used against him in any subsequent proceeding. (R. 215a, 218a–222a.) Indeed, petitioner had permitted his pleas of guilty to stand for fifteen months before moving to withdraw them (*supra*)—a circumstance which the trial judge, in imposing sentence, may have given some consideration, on the hypothesis that petitioner may have gone to trial for purposes of delay. (R. 747a–752a.)

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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